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No. 94-46

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

CLEMENT BERNARD,

Petitioner,

v.

CITY OF DALLAS WATER DEPARTMENT, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITIONER'S RESPONSE TO BRIEF IN OPPOSITION

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ARGUMENT

Respondent, rather than defending the actual reasoning of the Fifth Circuit, urges that alternative grounds may exist for affirming the decision below. The fact-based alternative grounds advanced by respondent are clearly insubstantial.

Respondent now urges that summary judgment was appropriate on petitioner's harassment claim because "[n]o evidence has ever been presented that . . . management was ever aware" of the harassment prior to petitioner's October

1988 complaint. (R. Br. Opp. 14). In fact, as is quoted at length in the petition, there was extensive evidence both that management knew of the systemic harassment long before October 1988 and that management refused to take any steps to end it. (Pet. 4-5). The affidavits proffered by petitioner on this issue were never disputed in the courts below.

With regard to petitioner's claim of racial discrimination in training, respondent now asserts "the record does not contain any evidence direct or indirect, of statements by Ketter or Petitioner's supervisor that they were determined to prevent any black worker from promoting into a T-9 position". (R. Br. Opp. 18). In fact, an affidavit recounting precisely such statements is in the record, and is quoted at p.6 of the Petition. Respondent asserts that "Ketter . . . could not directly influence the decision as to who was trained". (R. Br. Opp. 8). The only evidence on this issue, however, is an uncontradicted affidavit to the contrary that Ketter himself was actually responsible for the training. (Pet. 6).

Respondent candidly disavows the actual reasoning of the Fifth Circuit. The court of appeals insisted that the relevant legal issue was whether the employer had acted promptly "after *Bernard* complained". (Pet. App. 25a) (Emphasis added). In this Court, however, respondent now acknowledges that it was legally obligated to act once it had from any source "actual or constructive notice of a racially hostile work environment." (R. Br. Opp. 11).

Similarly, respondent acknowledges that the gravamen of petition's promotion claim is an allegation of discriminatory "denial of proper training needed for promotion", (R. Br. Opp. 17). In this Court respondent now concedes that Title VII would be violated if a worker were denied a promotion due to discrimination in training:

> Discrimination in access to training . . . is illegal under . . . Title VII . . .. The issue of discrimination in training usually arises in promotion cases in which an employee contends that he or she was not offered training available to others . . . and that . . . was the reason for the lack of promotion.

(R. Br. Opp. 17). The Fifth Circuit below, however, held otherwise, insisting that Ketter's discriminatory refusal to train petitioner was legally irrelevant so long as Ketter himself did not make the subsequent promotion decision. (Pet. App. 23a).

Had the Fifth Circuit below applied the legal standards now endorsed by respondent, petitioner would have prevailed in the court of appeals. Since respondent no longer defends the legal standard on which the Fifth Circuit's opinion was based, the appropriate disposition here may be to grant the petition, vacate the decision below, and remand for reconsideration in light of the position presently asserted by the respondent City of Dallas in its brief filed August 9, 1994. See, e.g., *Wells v. United States*, 62 U.S.L.W. 3704 (April 26, 1994); *Green v. United States*, 62 U.S.L.W. 3471 (January 18, 1994); *Woodward v. United States*, 62 U.S.L.W. 3318 (November 2, 1993); *Knox v. United States*, 62

U.S.L.W. 3318 (November 2, 1993); *McGinley v. United States*, 62 U.S.L.W. 3243 (October 5, 1993).

Respectfully submitted,

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